TEXAS CENTER FOR THE JUDICIARY

Child Welfare Case Law Update

Hon. Thomas Stuckey, Associate Judge
Centex Child Protection Court South

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November 13
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Ongoing Federal Litigation

Indian Child Welfare Act (ICWA)

Brackeen v. Zinke,
No. 4:17-cv-00868-O, __ F.Supp __, 2018 WL 4927908,
(N.D. Tex. Oct. 4, 2018)

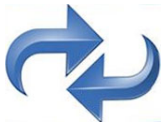
M.D. v. Abbott

Update

No. 18-40057, __ F. Supp __, __ WL __, (5th Cir. Oct. 18, 2018)

Transfer / Jurisdiction

Transfer Order/ Evidence of Transfer



In re S.H., 13-18-00240-CV (Tex. App.—Corpus Christi Sept. 27, 2018, no pet. h.) (mem. op.)

- April, 2004: 36th District Court Bee County issues final order in SAPCR.
- April, 2017: 343rd District Court names Department TMC of child pursuant to Chapter 262—which allows for emergency jurisdiction based on where child is found.

- Bee County has a rotating civil docket system in accordance with local rules.
- March, 2018: the 262 court terminates parental rights. Although the court took judicial notice of the 2004 SAPCR, it did not transfer the CCJ into itself.

- On appeal, the Department argued that the exchange of benches doctrine applied and that the 36th and 343rd district courts of Bee County shared concurrent jurisdiction.
- Court of appeals held that the exchange of benches did not apply as there was no indication that the 262 court was explicitly acting on behalf of the CCJ court.

- The Court of Appeals held that the 262 court lacked jurisdiction to enter a final order, so the termination order was thereby void.

In re L.S., S.V., and C.W., No. 06-17-00113-CV, ___ S.W.3d ___ (Tex. App.—Texarkana Mar. 9, 2018, no pet.).

- In 2010, a Gregg County district court entered a final SAPCR order establishing Father's paternity of L.S., appointing him the child's joint managing conservator, and ordering him to pay child support—thus acquiring continuing, exclusive jurisdiction under TFC § 155.001(a);
- In 2016, the Department filed a petition in Harrison County seeking protection of L.S. and his siblings under Chapter 262. Regarding L.S., the Department's petition stated, "Continuing jurisdiction over the children has been established in another Court, and a timely transfer will be sought."

- The Court of Appeals recognized the Chapter 262 court shares jurisdiction with the Chapter 155 CEJ court as to emergency and temporary orders, but not final orders.
- Under Chapter 155, the court of CEJ shall decide all motions to transfer, with the limited exception under TFC § 262.203(a)(2), which did provide that the Chapter 262 court could transfer a case from the CEJ court to itself if grounds existed for mandatory transfer.
  - This exception, as amended, allows the Chapter 262 court to transfer the case to itself without grounds for mandatory transfer.
- At trial, the Harrison County court was made aware that the Gregg County court previously entered final orders in a SAPCR and took judicial notice of the Gregg County court's file.

- The Court of Appeals abated for a limited evidentiary hearing on the transfer issue to determine whether grounds for mandatory transfer existed.
- At the hearing, the Gregg County final order and a subsequent child support modification order were introduced, and a determination by the Texas Department of State Health Services that the Gregg County court had CEJ was admitted. No transfer order was entered. The Harrison County court concluded that no grounds existed for mandatory transfer.

The Court stated, "The continuing, exclusive jurisdictional scheme is 'truly jurisdictional'—that is, when one court has continuing and exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void."

Accordingly, the Court vacated the trial court's termination order and dismissed the case.

TFC § 152.206 - UCCJEA

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In re W.R.C., No. 10-17-00250-CV (Tex. App.—Waco Dec. 20, 2017, no pet.) (mem. op.).

- On appeal from a private termination, Father argued the Texas trial court did not have jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) while the appeal of the order transferring jurisdiction was pending in Alabama.
- Mother and Father divorced in 2013 pursuant to a decree issued by a Russell County, Alabama court. Mother remarried and moved to Texas with the children. Mother and her second husband filed an Original Petition for Termination and Adoption in Brazos County, Texas in 2016.
- Mother also filed in Russell County, Alabama a Motion to Dismiss and Transfer Jurisdiction to Texas.

- In May 2017, the Circuit Court of Russell County, Alabama entered an order declining to exercise its jurisdiction over the matter, finding that Texas would be the more appropriate forum.
- Father appealed the Alabama court's order to the Alabama Court of Civil Appeals, and the issue of the transfer was pending in that appellate court.

- TFC § 152.206(a) provides in pertinent part:

A court of this state may not exercise its jurisdiction if, at the time the proceeding commences, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 152.207.

- The record demonstrated that no custody proceeding was pending in the Alabama courts; the last custody hearing was held in September 2015, and the custody order had been affirmed on appeal.
- In finding that the trial court did not err in exercising its jurisdiction, the Waco Court noted that:
  - the only pending matter in Alabama was the appeal from the trial court's order transferring jurisdiction;
  - the Alabama court conferred with the Texas court and determined Texas was the more convenient forum; and
  - Father had not cited any authority to support his argument that the Texas trial court did not have jurisdiction under the UCCJEA while the appeal of the order transferring jurisdiction was pending in Alabama.
- Termination of Father's parental rights was affirmed.

Trial Practice

Jury Issues: Allocation of Jury Strikes

S.B. v. Texas Dep't of Family and Protective Servs., No. 03-17-00431-CV (Tex. App.—Austin Dec. 22, 2017, pet. denied) (mem. op.).

- Mother's parental rights were terminated following a jury trial.
- On appeal, Mother argued the trial court committed reversible error by giving eight peremptory strikes to the parties aligned against her by the Department, the child's attorney *ad litem*, and the intervenor.
- In a civil case tried in district court, each party is entitled to six peremptory challenges. TEX. R. CIV. P. 233.

- Where there are multiple parties, "the trial court must determine whether the litigants aligned on one side are antagonistic to each other as to fact issues for the jury." If not, each side should have the same number of challenges.
- Whether aligned parties are antagonistic is a question of law based on information taken from the pleadings, pretrial discovery, voir dire, and other information before the court.
- If the record supports a conclusion of antagonism between the aligned parties, the trial court has the discretion to allocate strikes among the parties.

- If the record does not support antagonism or how the trial court allocated peremptory challenges, the appellate court must determine whether that error resulted in a "materially unfair" trial.
- Under a "relaxed" harmless error standard, "[w]hen the trial is hotly contested and the evidence sharply conflicting, the error results in a materially unfair trial without showing more."
- The Court of Appeals first concluded the record did not contain evidence of antagonism between the Department, the attorney *ad litem*, and the intervenor.

- The Court pointed out the following:
  - The Department and the intervenor agreed they were aligned in seeking termination of Mother's parental rights.
  - Although the child's attorney *ad litem* asserted she had a "different angle," she did not explain how her view of the child's best interest was in any way antagonistic.
  - At trial, the Department argued it was not aligned with the intervenor because the intervenor's petition did not request termination. During a pre-trial hearing, however, the intervenor stated her case "tracked" the Department's case.
- Therefore, the trial court erred in allocating an additional two strikes to the parties aligned against Mother.

- The Court then considered whether the error resulted in a materially unfair trial.
- Based on a review of the entire record which included eight days of testimony from seventeen witnesses, the Court could not conclude that the issues were not hotly contested or that the evidence relevant to the questions asked of the jury was not sharply conflicting, "before even turning to the issues tied solely to best interest."
- Therefore, the error resulted in a materially unfair trial without showing more, requiring reversal and remand.

Controlling the Courtroom

In re K.R., A.R., and G.L.C., No. 13-17-00281-CV (Tex. App.—Corpus Christi Oct. 26, 2017, pet. denied) (mem. op.).

- During a Department suit involving three of her children, Mother gave birth to a fourth child who was not removed from her care.
- At the termination trial as to the oldest three children, the Department objected because Mother brought her five-month old infant to trial.

- The Department's attorney asked that the child "not be allowed to be at the courtroom during the pendency of this trial" because "it's unfairly prejudicial to the jury to see her running around the courthouse feeding and taking care of a baby when we're in the process of terminating her parental rights."
- The trial court agreed, noting that "the courtroom isn't an appropriate place for a baby" and that while the child could be in the courthouse, he could not be in the courtroom.

On appeal, Mother argued the trial court erred by not allowing her infant child to be present during trial, claiming the decision was "highly prejudicial and probably left the fact finder with the impression that the infant child is not important to the mother."

The Court of Appeals disagreed, holding that trial courts have "broad discretion over the conduct of its proceedings" and that this includes the ability to "maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time".

Therefore, "[w]e cannot conclude that the trial court abused its broad discretion in implicitly determining that the exclusion of a five-month-old infant from the courtroom was necessary to maintain control of the proceedings."

Termination Grounds

TFC § 161.001(b)(1)(D): Outcries of Older Children

In re K.A.R., No. 04-17-00723-CV (Tex. App.—San Antonio April 11, 2018, no pet.) (mem. op.).

- Mother's parental rights were terminated to K.A.R. who was 3 at the time of trial.
- Mother argued the evidence was insufficient to support the trial court's finding under subsection (D).
- The Court of Appeals observed the evidence reflected Mother's relationship with Father endangered the child's physical and emotional well-being.

- The trial court heard evidence that:
  - both of K.R.M.'s siblings made outcries that Father was violent, punched holes in the walls, and threw things, and that they witnessed domestic violence between Mother and Father;
  - one sibling made an outcry that Father had sexually abused her, and the other sibling reported Father was physically abusive towards him;
  - Mother did not believe the outcry of sexual abuse and continued living with Father.

- The Court concluded "although [the child] could not verbalize his feelings or state what he personally witnessed, the evidence in the record regarding the outcries of [the child's] older siblings demonstrates that [Mother] had placed and would continue to place the child in conditions or surroundings that endangered his physical and emotional well-being."
- Accordingly, the Court held that sufficient evidence supported the jury's findings under subsection (D).

TFC § 161.001(b)(1)(D):
Overindulgence in Prescription Drugs

In re A.M., No. 07-17-00094-CV (Tex. App.—Amarillo Sept. 21, 2017, pet. denied) (mem. op.).

- Mother appealed the termination of her parental rights under subsection (D).
- The Court of Appeals noted the evidence showed an Early Childhood Intervention Services worker and a local sheriff had discovered Mother at home "unconscious atop household furniture" while the fifteen-month-old child "walked about the area" unsupervised.
- Mother claimed her unconsciousness was caused by an adverse reaction to NyQuil, but law enforcement discovered hydrocodone and opioids in Mother's body.

- The Court questioned Mother's explanation of taking NyQuil at 9 in the morning without any plan for child care, "knowing of its likely effect." This "[left] the child free to wander unsupervised though an area strewn with medicine and pills."
- The Court cited evidence that: (1) Mother was also on Ambien, Tylenol, and Buspirone or Ativan at the time; (2) Mother was discharged from a pain clinic six weeks earlier for violating a "pain contract;" and (3) Mother consistently fell asleep or "doze[d] off" throughout the case, even when visiting the child.

The Court concluded "[Mother's] history of ingesting multiple and diverse drugs which affect her ability to stay awake and care for the fifteen-month old child knowingly placed the child in conditions or surroundings endangering her physical well-being" and "[t]hough [her] drug use may not have been illegal, the end is the same; the over-indulgence in prescribed medication had the potential for endangering the child."

TFC § 161.001(b)(1)(E): Emotional Abuse Alone Supports Endangerment Finding

In re Z.O., No. 02-17-00166-CV (Tex. App.—Fort Worth Sept. 7, 2017, no pet.) (mem. op.).

- On appeal, Mother challenged the sufficiency of the evidence supporting the trial court's (E) finding.
- The Court of Appeals noted no evidence was presented at trial of the usual alcohol or drug abuse, physical abuse, sexual abuse, or neglect.
- Rather, the Department proceeded on emotional abuse; abuse which was the byproduct of the manner in which Mother functioned as a person and parent.

- The evidence showed Mother and two of her children came to Texas to escape domestic violence.
- Mother did not have a job, or a plan, other than to stay with her father with whom she was not close.
- Her father kicked them out of the house and they became homeless.
- Mother asked the Department for help, and she was offered services that would have allowed the family stay together, but she opted to place her children in foster care.

- Mother participated in services and the child was placed back with her in a monitored return.
- Within five weeks, Mother again asked that the child be put in foster care.
- The Department then proceeded to a jury trial and Mother's rights were terminated.

- The Court noted Mother threatened to place the child in foster care if she misbehaved, and requested that she be placed in foster care in front of her.
- A Department supervisor stated: "It's harmful to a child. It's unacceptable. It's ridiculous. It should never happen."
- Mother's threats were not isolated. A Department caseworker heard Mother say to the child on another occasion, "if she's bad, she would go back to foster care. That [Mother] would go back to Illinois and take care of [the child's] siblings who behaved."
- The caseworker testified children cannot feel safe when their parents are constantly trying to give them away.

- A therapist testified that the child exhibited "separation fear-based behaviors" and that the threat of losing her home at any time created the type of anxiety that "handicaps a child's ability to make effective developmental progress across all domains."
- In reference to this evidence, the Court cited case law holding that conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being.

- The record further reflected that when the child was removed from the monitored return, the child shouted "Mommy, please don't kill yourself."
- Mother admitted the child overheard her tell someone she would kill herself if she was removed from her care. Mother refused to reassure the child she would not kill herself and just said "I don't know."
- When asked if the second removal damaged the child's emotional well-being, the trauma therapist said "It made a pretty good dent."
- Other testimony showed that Mother was not functioning as a parent such as when the child complained about going to school, Mother just told her to go back to bed.

- The Court concluded that the testimony established a parent's failure to function as a parent is emotionally detrimental to a child: the clinical psychologist testified that parents who are not empathetic to their children's needs "create confusion, despair, sadness, resentment, anger, rage, and trust issues" for the child.
- The Court concluded the evidence was legally and factually sufficient to support the (E) finding and affirmed the judgment.

TFC § 161.001(b)(1)(E): Presence of Drugs in Child's System

In re B.F., P.M.F. a.k.a P.F., No. 14-17-00421-CV (Tex. App.—Houston [14th Dist.] Nov. 16, 2017, no pet.) (mem. op.).

The Court of Appeals held the evidence of Mother's substance abuse problem and denial she had a problem supported termination of her parental rights under subsection (E).

- The evidence showed Mother and the child tested positive for cocaine when the child was born.
- The Court stated the trial court was entitled "to disbelieve Mother's ever-changing account" of how cocaine was in her system, and to rely on the drug test results.
- The Court wrote, "It appears [the child] has not suffered further medical effects. But the drug's mere presence in her system harmed her, and the apparent lack of more damage does not diminish that harm."

TFC § 161.001(b)(1)(N): Reasonable Efforts Shown In Absence of Service Plan

In re J.G.S., ___ S.W.3d ___, No. 08-17-00192-CV (Tex. App.—El Paso Feb. 14, 2018, no pet.) (mem. op.).

On appeal, Father challenged the sufficiency of the evidence supporting the trial court's (N) finding, specifically the element regarding the Department's reasonable efforts to return the child to him.

He argued the evidence was insufficient because the Department failed to create a service plan for him.

- The Court observed both that the Department did not create a service plan for Father and that Father was incarcerated.
- The evidence established the Department made efforts to place the child with relatives on both the maternal and paternal sides of the family.
- A month before trial, the Department placed the child with a paternal aunt and uncle.

- The Court held the Department's efforts to place the child with relatives may constitute sufficient evidence to support the trial court's finding that the Department made reasonable efforts.
- Therefore, the Court concluded "the evidence is legally and factually sufficient to support the trial court's finding that the Department made reasonable efforts to return the child to Father through a surrogate."
- The termination of Father's parental rights was affirmed.

Best Interest of the Child

In re J.C.C. No. 04-17-00120, 2017 WL 3722034 (Tex. App.-San Antonio August 30. 2017).

- Was the evidence factually sufficient to support the trial court's best interest finding against Father?

- In April, 2016, DFPS brought their suit to terminate the parental rights of mother and the fathers of the children.
- The children were removed from their mother's care because of her ongoing drug use and her neglectful supervision of the children. Father was incarcerated.
- The case proceeded to trial in February, 2017 and Father's parental rights were terminated. Father appealed challenging the sufficiency of the evidence to support the Trial Court's finding that termination of his parental rights was in the children's best interest.

- The Court found that at the time of the removal, J.C.C., Sr. (Father) was incarcerated for assault family violence and during the case had been incarcerated for two additional charges of possession of a controlled substance.
- Testimony at trial established that Father completed several items on his service plan, including a domestic violence class, possibly a parenting class, a drug & alcohol assessment, and a few substance abuse treatment classes. Although, he was unsuccessfully discharged from his individual therapy due to his incarceration.
- The caseworker testified that the children were living at St. Jude's because no potential caretakers had been located because the children have serious behavioral issues, making them difficult to place.

- On the day of trial, maternal grandmother expressed a willingness to care for the children.
- No evidence was presented regarding the children's desires; however the Court stated, "their serious behavioral issues are a sign that the instability of their lives has affected them."
- The Court further noted that, at the time of bench trial, Father was not employed, was living with a family member who had a history with CPS, and was pending sentencing on one of his possession offenses.
- The Court held that the evidence was sufficient to support the trial court's finding that termination was in the best interest of the children.

In re E.J.M., No. 04-17-00569-CV
(Tex. App.—San Antonio Jan. 3, 2018, no pet.) (mem. op.)

- Best interest challenge.
- Caseworker testified: (1) Father attended thirty-five out of seventy-six possible visits; (2) would "visit, and then he would stop for a month or two at a time; and then suddenly he would start coming again;" and (3) the unpredictability of Father's attendance caused the child to become "very sad and depressed."

- CASA witnessed the child "break down and cry" when father failed to show up for a visit.
- Court of Appeals considered this conduct under the "*desires of the child*" *Holley* factor.
- The Court found that this factor weighed in favor of termination of father's parental rights because of the impact that father's failure to attend visitation had on child.

In re L.J.T., No. 04-17-00567-CV (Tex. App.—San Antonio Feb. 28, 2018, no pet.) (mem. op.)

- Best interest challenge.
- Child born cocaine-positive with severe special needs requiring hospitalization for the first three months of life.
- Father incarcerated at time of child's birth and during hospitalization due to assault on mother.

- Court weighed the second and third *Holley* factors—the emotional and physical needs of, and danger to, the child now and in the future.
- The Court noted the child's young age and medical fragility rendered her vulnerable if left in the custody of a parent who is unable or unwilling to protect her or attend to her needs.

- Court also noted that father was incarcerated for his second conviction of assault on mother.
- Further, father's criminal conduct had left him unable to intervene in mother's drug use to protect the unborn child and was not present at the time of the child's birth. His own conduct therefore made him unable or unwilling to protect the child or to attend to the child's current and future needs.

Affidavits of Relinquishment

TFC § 161.211 Direct or Collateral Attack on Termination Order

(c) A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to **fraud, duress, or coercion** in the execution of the affidavit.

In re K.S.L., 538 S.W.3d 107 (Tex. 2017)

Parents challenged the sufficiency of the evidence that termination of their parental rights was in the child's best interest. The San Antonio Court of Appeals reversed and rendered, finding the evidence legally insufficient. 499 S.W.3d 109.

The Department filed a petition for review.

TFC § 161.211(c) limits appellate review to fraud, duress or coercion.

SCOTX rejects argument that this is a violation of due process rights, analogizing relinquishment to a plea agreement.

Safeguards included in the requirements for an affidavit of relinquishment avoid the risk of erroneous decisions. And the affidavit itself is strong evidence of best interest determination.

TFC § 161.211(c) does not bestow jurisdiction, so order of termination based on affidavit of relinquishment can be directly attacked for want of jurisdiction.

Post-Trial Matters

In re R.R., 537 S.W.3d 621
(Tex. App.—Austin 2017, orig. proceeding).

Mother loses adversary hearing. She files notice of de novo regarding:

(1) Finding of aggravating circumstances;

(2) Whether Dr. Michael Holick should have been allowed to provide expert testimony;

(3) Whether Child should be allowed to travel for additional medical testing; and

(4) Whether Child should be placed with relatives during pendency of the case.

Trial court entered order indicating that it would only consider the transcript for the de novo hearing.

Parents seek mandamus relief.

TFC § 201.015(c)

The referring court may consider the transcript from the original hearing, and "the parties *may present witnesses*" at the de novo hearing. (emphasis added)

Mandamus conditionally granted because the trial court abused its discretion in not allowing Mother to present additional witnesses.

Indian Child Welfare Act (Continued)

In re J.J.T., 544 S.W.3d 874 (Tex. App.—El Paso 2017, no pet.).

Child suffered from non-accidental trauma.

Child is eligible to be enrolled with the Navajo Nation, is "Indian child." Tribe favors termination, but contests future placement.

The Nation's representative testified by phone in favor of termination, attempted to orally intervene when trial court ruled that she was subject to the Rule. In response, the Nation's representative attempted to orally intervene.

Appeal ensued.

25 U.S.C. § 1911(c)

"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."

ICWA preempts Tex. R. Civ. P. 60's requirement for a written intervention.

Reverse and remand.